No. 13023

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AL FREED, FRED JOHNSON and RALPH KUSHNER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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Foreword.

Appellant's Opening Brief contains three points of law, the first two of which were each divided into two sub-points of law.

The Appellee's brief, contains three points of law, the first two of which are in answer to the two sub-points of Appellant's first contention, the third Appellee's point being in answer to Appellant's third point of law. For such reason, said matters will be presented, indicating the contentions of both Appellant and Appellee on the controverted matters of law.

The second point of law, as contended for by Appellant, namely, "Having plead *nolo contendere,* the appellant may, upon appeal, contend that the counts to which he made such plea, do not state a public offense by reason of the fact that they are barred by the statute of limitations," is not considered or denied in Appellee's brief and the correctness of the law therein stated is inferentially thus conceded.

Statement of Facts.

Although worded differently, the Statement of Facts in Appellant's Opening Brief and Appellee's Brief essentially are in conformity.

Chronologically, they indicate as follows:

January 27, 1947, acts complained of in Count Four (4) of the Indictment, were committed [Tr. of Rec. p. 5].

February 6, 1947, acts complained of in Count Two (2) of the Indictment, were committed [Tr. of Rec. p. 4].

June 28, 1950, Federal Grand Jury returns Indictment [Tr. of Rec. p. 6].

July 7, 1950, Appellant files Motion to Dismiss and Quash on the ground that Counts Two (2) and Four (4) and others are barred by the Statute of Limitations [Tr. of Rec. p. 8].

August 28, 1950, Appellant filed Motion for Bill of Particulars [Tr. of Rec. p. 9].

September 25, 1950, court denies Motion for Bill of Particulars and Motion to Dismiss and Quash [Tr. of Rec. p. 38].

October 30, 1950, Appellant plead not guilty to all Counts of the Indictment.

April 24, 1951, Appellant withdrew his plea as to Counts Two and Four and plead *nolo contendere* to said Counts.

June 4, 1951, Appellant is sentenced to six (6) months imprisonment on Count Two (2) and a fine of $1,000.00 on Count Four (4).

ARGUMENT.

I.

That Counts Two (2) and Four (4) of the Indictment Are Barred by the Statute of Limitations and Particularly Title 18 of the United States Code—Crimes and Criminal Procedure, Section 3282.

Appellant's Contention.	Appellee's Contention.
That said Section 3287 is Inapplicable to the Offenses charged in Counts Two (2) and Four (4) of the Indictment. (Appellant's Op. Br. p. 8.)	Section 3287 of Title 18 of the United States Code, Known as the Suspension Act, or Statute, is Applicable to Section 1731(a) of Title 12 of the United States Code. (Appellee's Br. p. 9.)

The respective contentions of each party on this issue of law is dependent upon the distinguishment of the cases of *United States v. Gottfried,* 165 F. 2d 360, relied upon by Appellee and *Marzani v. United States,* 168 F. 2d 133, relied upon by Appellant.

As pointed out in Appellee's Brief, three trial courts have written decisions which followed the *Gottfried* case (Appellee's Br. p. 12). Likewise, one of the District Court Judges of this District, has so ruled (Appellee's Br. p. 12). As far as diligent research can produce, these appear to be the only instances where the decision of *United States v. Gottfried* was followed. The *Marzani* case, however, has received the approval of numerous cases, including United States Court of Appeals for the Second Circuit, which was the author of the *Gottfried* decision.

Although referred only in its footnotes, said court, in *United States v. Obermeier,* 186 F. 2d 243, followed the theory of the decision of the *Marzani* case and relied upon *United States v. Novack,* 271 U. S. 201; *United States v. McElvain,* 272 U. S. 633, and *United States v. Scharton,* 285 U. S. 518, as the authorities for such decision, which cases were likewise the authorities for the *Marzani* decision.

The more recent decisions of trial courts have likewise followed said decisions and have expressly adhered to the rule established in *Marzani v. United States, supra.*

In the case of *McGuinness v. United States,* 77 A. 2d 22, arising in the District of Columbia and decided on December 1, 1950, the Court of Appeals for said district held in reversing a judgment in a criminal proceeding, wherein the defendant illegally passed checks payable to the Treasurer of the United States, more than three years prior to the bringing of the Indictment. In reversing the judgment and holding that the Wartime Suspension of Limitations Act (18 U. S. C. A., Sec. 3287) was inapplicable, the court held on page 24:

> "This concession was a necessary one under the reasoning of Marzani v. United States, 83 U. S. App. D. C. 78, 168 F. 2d 133, affirmed by an equally divided court 335 U. S. 895, 69 S. Ct. 299, 93 L. Ed. 431, reaffirmed upon rehearing by an equally divided court 336 U. S. 922, 69 S. Ct. 513, 93 L. Ed. 1084; United States v. Gilliland, 312 U. S. 86, 61 S. Ct. 518, 85 L. Ed. 598; United States v. Scharton, 285 U. S. 518, 52 S. Ct. 416, 76 L. Ed. 917; United States v. McElvain, 272 U. S. 633, 47 S. Ct. 219, 71 L. Ed. 451; United States v. Noveck, 271 U. S. 201, 46 S. Ct. 476, 70 L. Ed. 904. These cases did not

involve the District of Columbia bad check law, but they did involve other statutes, such as the False Claims Act, wherein it was charged that defrauding the United States had resulted from the crime committed. The courts decided that statutes extending periods of limitation were to be liberally construed in favor of repose and held to apply only to cases shown to be clearly within their purposes. The conclusions were reached that the Wartime Suspension of Limitations Act and other Statutes allowing longer period of limitation were not applicable."

The last reported case upon the subject matter is that of *United States v. Shoso Nii,* 95 Fed. Supp. 971, decided in the United States Circuit Court of Hawaii on April 27, 1951. In said case, the defendant was charged with making false statements in the procuring of a passport. He was indicted more than three years thereafter and the question presented, was the applicability of the Wartime Suspension of Limitations Act. In holding that the same was not applicable and that the offenses alleged in the Indictment were outlawed, Judge Metzger held at page 972:

"The defendant, however, earnestly contends that Section 3287 is not applicable, for the reason that Section 220, *supra,* does not in so many words involve 'fraud or attempted fraud against the United States.'

"Such a construction of Section 220 may seem to be strained, but it is literally true and such construction seems to find support in the interpretation given by the Supreme Court to former 18 U. S. C. A., Section 582, now Section 3282, which contained a proviso fixing the period of limitation at six years

'in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by consipracy or not, and in any manner, . . .'

"In United States v. Noveck, 271 U. S. 201, 203-204, 46 S. Ct. 476, 70 L. Ed. 904, the charge was perjury, as defined by Section 125 of the former Criminal Code. The indictment charged that the defendant made the perjurious statement 'for the purpose of defrauding the United States' in an income tax matter. Yet even in that case, the Supreme Court held that, since such defrauding was not 'an element of the crime defined in Section 125, the six-year limitation could not apply: 'The construction of sections 125 and 1044 (the latter containing the six-year proviso) contended for by the government divides perjury into two classes. It makes one include offenses having the elements specified in section 125 and the other to include those containing the further element of purpose to defraud the United States. And that would apply similarly to every offense to which the three-year period fixed by section 1044 was applicable before the proviso was added. The effect is to create offenses separate and distinct from those defined by specific enactments. Obviously that was not intended. That Act of November 17, 1921, merely added a proviso to a statute of limitations. Statutes will not be read to create crimes, or new degrees or classes of crime, unless the purpose so to do is plain. The language in question does not require the construction contended for. Indeed it is not all appropriate for the making of such classifications or the creation of offenses. Its purpose is to apply the six-year period to every case in

which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense. There are several such offenses. Section 37 affords an illustration. But perjury as defined by section 125 does not contain any such element.'

"In United States v. Scharton, 285 U. S. 518, 521-522, 52 S. Ct. 416, 76 L. Ed. 917, the charges set forth attempts to evade income taxes by falsely understating taxable income. The statute punished attempts 'to evade or defeat any tax.' Yet even in that case, the Supreme Court, after taking pains to enumerate eleven statutes 'expressly making intents to defraud and element of a specified offense against the revenue laws,' added: 'And, as the section has to do with statutory crimes, it is to be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds not *so denominated* by the statutes creating offenses. (Cases cited.) The purpose of the proviso is to apply the six-year period to cases 'in which defrauding or an attempt to defraud . . . is an ingredient under the statute defining the offense.' (Emphasis supplied.)

"In a recent case, the Court of Appeals for this Circuit refrained from expressing an opinion as to the effect of the suspension acts. Bridges v. United States, 9 Cir., 184 F. 2d 881, 883. In two other Circuits, however, the Noveck and Scharton cases have been construed in the same way that this Court is now interpreting them.

"The decisions referred to are Marzani v. United States, 83 U. S. App. D. C. 78, 168 F. 2d 133, 135-137, affirmed by an equally divided court, 335 U. S.

895, 69 S. Ct. 299, 93 L. Ed. 431, reaffirmed by an equally divided court, 336 U. S. 922, 69 S. Ct. 513, 93 L. Ed. 1075; United States v. Obermeier, 2 Cir., 186 F. 2d 243, 256-257. The latter decision, handed down on December 20, 1950, seems to have been overlooked by counsel."

It is respectfully submitted that a reading and study of all said authorities result in the conclusion that the "War-time Suspension of Limitations Act" (18 U. S. C. A., Sec. 3287) is only applicable, as held in *United States v. Obermeier, supra,* "when fraud or attempted fraud against the United States or one of its agencies is an ingredient under the statute defining the offense."

The statute under which both Counts of the Indictment herein discussed were brought, is set forth in full on pages 16 and 31 of Appellant's Opening Brief and page 4 of Appellee's Brief. Nowhere in said statute (Title 12, Sec. 1731(a), now Title 18, Sec. 1010) is fraud or attempted fraud against the United States or one of its agencies, made a statutory ingredient of the offense.

By use of a statute of the State of Louisiana (Appellee's Br. p. 11), the only state in the Union whose laws are not based upon the Common Law, Appellee seeks to read into the section, the missing ingredient of fraud or attempted fraud. Said statute is a Civil Law rule and finds no counterpart, either in Common Law or the statutes of the United States.

Not from the words of the Code section involved, but only from inferences drawn therefrom, does the Appellee seek to argue that fraud or attempted fraud, is an ingredient of the offense (Appellee's Br. p. 10).

In the notes to its decision, the Court of Appeals for the Second Circuit, in *United States v. Obermeier, supra,* noted that "In United States v. Gilliland, 312 U. S. 86, 61 S. Ct. 518, 85 L. Ed. 598, the offense was defined as to make fraud an ingredient." An examination of the *Gilliland* case indicates that the challenged counts of the Indictment were brought under Section 35 of the Criminal Code (18 U. S. C. A., Sec. 80) which prohibited the making "in any matter within the jurisdiction of any department or agency of the United States . . . (of) . . . fraudulent statements or representations." Special legislation had been passed to deal with the problem of the inter-state transportation of "Hot Oil." The President had designated the Secretary of Interior as the enforcer of such statute and he, in turn, had promulgated the regulation requiring the reports, allegedly falsely and fraudulently made. After considering said Section 35 of the Criminal Code in light of the subsequent legislations and the regulations and the regulations of the Secretary of Interior, all of which were allegedly violated, the court examined the legislative history and ascertained therefrom the meaning, "intent to defraud the United States." (See p. 94 of the Decision.)

The Court of Appeals for the Second Circuit further noted, "so, too, in Gottfried v. United States, 2 Cir., 165 Fed. (2d) 360 as we there interpreted the statute creating the crime." The statute alleged in the *Gottfried* case, to be violated in the Indictment, was Title 18, U. S. C. A., Section 80. The Court based its decision upon the premise, it has been the law at least since 1910, that in the statute under which this Indictment was drawn "fraud" includes conduct "calculated to obstruct or impair its" (the United States) "efficiency and destroy the value

of its operations and reports." Said quoted law is based upon and the citations are from the case of *Haas v. Henkel,* 216 U. S. 462, 479, 30 S. Ct. 249, 254, 54 L. Ed. 569, 17 Ann. Cas. 1112, which case was decided on February 21, 1910. The only issue involved in said case was the sufficiency of an Indictment alleging a conspiracy to defraud the United States, but not alleging pecuniary loss. The acts alleged were the filing of "false cotton crop reports." At the time said case was decided 18 U. S. C. A., Section 80, prohibited the filing of false statements "with the intent of cheating and swindling or defrauding the Government of the United States or any department thereof . . ." The *Gottfried* case did not consider the cases of *United States v. Noveck (supra); United States v. McElvain (supra),* or *United States v. Scharton (supra),* which cases were existing and established the rule that fraud or attempted fraud must be a statutory ingredient in order to make the Wartime Suspension of Limitations Act applicable. The Court justified its decision in applying said act (Title 18, Sec. 3287) by stating:

> "Besides, the purpose of the amendment was not to let crimes pass unpunished which had been committed in the hurly-burly of war, an overriding motive which perfectly fits the situation at bar."

The first of the cases establishing the rule contended for by Appellant is *United States v. Noveck,* 271 U. S. 201, 46 S. Ct. 476, 70 L. Ed. 904, decided May 10, 1926, wherein the defendant was charged with perjury (Sec. 125 of the United States Criminal Code) which provided:

> ". . . 'Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare,

depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, . . .'"

Therein the contention of the Government was the same as that herein contended for by the Appellee. In holding the suspension provision not applicable, the Supreme Court held:

"The construction of Sections 125 and 1044 contended for by the Government divides perjury into two classes. It makes one include offenses having the elements specified in Section 125 and the other to include those containing the further element of purpose to defraud the United States. And that would apply similarly to every offense to which the three year period fixed by Section 1044 was applicable before the proviso was added. The effect is to create offenses separate and distinct from those defined by specific enactments. Obviously that was not intended. The Act of November 17, 1921, merely added a proviso to a statute of limitations. Statutes will not be read to create crimes, or new degrees or classes of crime, unless the purpose so to do is plain. The language in question does not require the construction contended for. Indeed it is not at all appropriate for the making of such classifications or the creation of offenses. Its purpose is to apply the six year period to every case in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense."

The next case establishing such rule is *United States v. McElvain*, 272 U. S. 633, 47 S. Ct. 219, 71 L. Ed.

451, decided December 6, 1926. Its decision was based upon the *Noveck* decision, which it cited as authority for its holding.

The case of *United States v. Scharton,* 285 U. S. 518, 52 S. Ct. 416, 76 L. Ed. 917, decided April 11, 1932, made definite the rule contended for. In it, the defendant was charged with violation of Title 26, U. S. C. A., Section 1266, which provided as follows:

> "Any person . . . who willfully attempts in any manner to *evade* or *defeat* any tax imposed by this title or the payment thereof shall . . . be guilty of a felony . . ." (Emphasis ours.)

The Government appealed from a ruling that the Suspension Act was not applicable, contending that the words "evade or defeat" inferred defrauding or attempting to do so. In regard thereto, the Court holds at page 520 as follows:

> "The appellant contends fraud is implicit in the concept of evading or defeating; and asserts that attempts to obstruct or defeat the lawful functions of any department of the Government (Haas v. Henkel, 216 U. S. 462, 479, 480, 54 L. ed. 569, 576, 577, 30 S. Ct. 249, 17 Ann. Cas. 1112) or cheat it out of money to which it is entitled (Capone v. United States (C. C. A. 7th) 76 A. L. R. 1534, 51 F. (2d) 609, 615) are attempts to defraud the United States if accompanied by deceit, craft, trickery or other dishonest methods or schemes, Hammerschmidt v. United States, 265 U. S. 182, 188, 68 L. ed. 968, 970, 44 S. Ct. 511. Any effort to defeat or evade a tax is said to be tantamount to and to possess every element of an attempt to defraud the taxing body."

After denying the Government's contention, the Court concludes at page 521, that:

> "There are, however, numerous statutes expressly making intent to defraud an element of a specified offense against the revenue laws. Under these, an indictment failing to aver that intent would be defective; but under Section 1114 (b) such an averment would be surplusage, for it would be sufficient to plead and prove a willful attempt to evade or defeat. Compare United States v. Noveck, 271 U. S. 201, 203, 70 L. ed. 904, 905, 46 St. Ct. 476.
>
> "As said in the Noveck Case, statutes will not be read as creating crimes or classes of crimes unless clearly so intended, and obviously we are here concerned with one meant only to fix periods of limitation. Moreover, the concluding clause of the section, though denominated a proviso, is an excepting clause and therefore to be narrowly construed. United States v. McElvain, 272 U. S. 633, 639, 71 L. ed. 451, 453, 47 S. Ct. 219. And as the section has to do with statutory crimes it is to be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses. United States v. Hirsch, 100 U. S. 33, 25 L. ed. 539; United States v. Rabinowich, 238 U. S. 78, 87, 88, 59 L. ed. 1211, 1214, 1215, 35 S. Ct. 683, 42 Am. Bankr. Rep. 843; United States v. Noveck, 271 U. S. 201, 70 L. ed. 904, 46 S. Ct. 476, *supra*; United States v. McElvain, 272 U. S. 633, 71 L. ed. 451, 47 S. Ct. 219 *supra*. The purpose of the proviso is to apply the six year period to cases 'in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense.' United States v. Noveck, 271 U. S. 201, 70 L. ed. 904, 46 S. Ct. 476, *supra*."

Thus, the Supreme Court chose not to follow either the case of *Haas v. Henkel (supra),* upon which the *Gottfried* decision was based, or the case of *Hammerschmidt v. United States,* 265 U. S. 182, upon which the trial court herein held that the challenged Counts of the Indictment were not outlawed [Tr. of Rec. p. 48].

Based upon said cases of *United States v. Noveck, supra; United States v. McElvain, supra,* and *United States v. Scharton, supra,* the case of *Marzani v. United States, supra,* summarize the rule contended for by Appellant. This case is cited at length in Appellant's Opening Brief (Appellant's Op. Br. pp. 10, 12-15) and further quotation therefrom would be repetitious. Said case quotes at length from the aforesaid three cases and concludes therefrom, with the resume of the law applicable.

Also based upon the *Noveck, McElvain* and *Scharton* cases, the Court of Appeals for the Second Circuit, followed the contended for rule of law in the case of *United States v. Obermeier,* 186 F. 2d 243. This is the last expression by a Court of Appeals of the United States upon the subject matter. In said case, a Writ of Certiorari was denied by the United States Supreme Court on March 26, 1951 (340 U. S. 951, 95 L. Ed. 452). In said case, the Indictment alleged the violation of Title 8, U. S. C. A., Section 746, which provides as follows:

> "(a) It is hereby made a felony . . .
>
> "(b) Knowingly to make a false statement under oath, either orally or in writing, in any case, proceeding or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship."

The Statement of Law of the *Obermeier* case (see Op. Br. p. 15), being supported by the aforesaid author-

ities, the only objection of the Appellee thereto is that "In the *Obermeier* case the Court devotes two paragraphs at the end of a rather lengthy decision, to discuss the applicability of Section 3287 of the Suspension Act to an indictment charging a false statement under oath in a matter relating to naturalization and citizenship." The only merit of such objection is its uniqueness. It is respectfully submitted that it is not the quantity of the citation but its quality that invites the respect of this Honorable Court. Appellee's objection to the *Obermeier* case on the ground of the brevity of the pertinent portions and their position at the conclusion of the decision, is more applicable to the case of *United States v. Gottfried, supra,* since the *Obermeier* case devotes two paragraphs and the *Gottfried* case only one paragraph, both at the end of the respective decisions, to the discussion of the applicability of the Suspension Act.

The present-day acceptance of the *Marzani* case is indicated by *McGuinness v. United States, supra,* and *Shoso Nii, supra,* each of said cases following expressly the *Marzani* case and indicating its adherence to the *Noveck, McElvain* and *Scharton* cases.

It is respectfully submitted that the law applicable is that pronounced in *United States v. Noveck, supra; United States v. McElvain, supra,* and *United States v. Scharton, supra,* and the subsequent cases adhering to the legal principles therein established, namely, *Marzani v. United States, supra; United States v. Obermeier, supra,* and the other cases herein cited.

The conclusion of the Appellee that "this Court has already suggested a preference for the broad rule of the *Gottfried* decision in *Furrow v. Koutsky-Brennan-Vana Company,* 182 F. 2d 496, and *Danebe Lumber Company*

v. Koutsky-Brennan-Vana, 182 F. 2d 489." finds no support in the reading of said decisions. In both of said decisions, this Honorable Court calls attention to the existence of a conspiracy "to defraud the United States under the then Section 37 of the Criminal Code, 18 U. S. C. A., Section 88 (now Sec. 371)." An examination of said Section 37 of the Criminal Code indicates that the crime prohibited is statutorily defined "if two or more persons conspire . . . to *defraud* the United States in any manner." (Emphasis ours.) Thus, said cases support the rule contended for by Appellant, since fraud or attempted fraud is a statutory ingredient of the offense.

In the within case, Count One (1) of the Indictment alleged a conspiracy under said section (18 U. S. C. A., Sec. 88). No attempt was made to dismiss or quash said count on the ground that it was barred by the Statute of Limitations [Tr. of Rec. p. 8]. Subsequently, said count was dismissed as to Appellant [Tr. of Rec. p. 43].

It is respectfully submitted that Section 3287 is inapplicable to the offenses charged in Counts Two (2) and Four (4) of the Indictment, since both of said Counts are brought under former Section 1731(a) of Title 12, which does not make fraud or attempted fraud of the United States, or any of its agencies, an ingredient of the offenses defined.

Appellant's Contention.

That if the Suspension Act was applicable, the Offenses charged in Counts Two (2) and Four (4) of the Indictment would still be barred by the Statute of Limitations. (Appellant's Op. Br. p. 20.)

Appellee's Contention.

The operation of Section 3287 of Title 18 of the United States Code allows the prosecution of Counts Two and Four of the Indictment at any time up to January 1, 1953. (Appellee's Br. p. 15.)

The respective contentions of the Appellant and Appellee on this issue concerns the matter of interpretation of the word "suspended." Appellant contends that the word as used in Section 3287 should be interpreted in its common meaning, namely, that for the period therein provided, the usual statute of Limitations is suspended and becomes effective and operative upon the termination of the Suspension Act.

Appellee contends that the same is "tolled" (see Appellee's Br. p. 16), and that it commences upon the termination of the Suspension Act. Appellant, at length, cites cases dealing with prior Suspension Acts, particularly those during the Civil War period which support the contentions of Appellant. Appellee relies solely upon the cases of *United States v. Bridges,* 86 Fed. Supp. 922, and *Danebo Lumber Co. v. Koutsky-Brennan-Vana Co., supra.*

The court's attention is respectfully invited to the fact that this Honorable Court expresses no preference of theory in the *Bridges* case, but merely states the existence of the diverse opinions in the *Gottfried* and *Marzani* cases and concludes therefrom that there was a substantial matter presented in the appeal of the Appellant, which justified his being allowed to be on bail pending such appeal (Appellant's Op. Br. p. 18).

Hereinbefore, at length, Appellant has invited the court's attention that the *Danebo Lumber Co. v. Koutsky-Brennan-Vana Co., supra,* involves a statute which is subject to the Suspension Act by reason of the fact that fraud against the United States or one of its agencies is a statutory ingredient of the offense charged. In neither of said cases does this Honorable Court discuss or decide

whether, under the Suspension Act, the Statute of Limitations is "suspended" or "tolled."

In its ordinary sense, the word *suspend* means "to cause to cease *for a time* from operation or effect." (Emphasis ours.) (Webster's New 20th Cent. Dict. 1951 Ed.) When defined by the courts, the same meaning has been adhered to. In Black's Law Dictionary, the term *suspended* is defined to mean "to interrupt; to cause to cease for a time; to discontinue temporarily but with an expectation or purpose of resumption." Cited in said work as authorities therefore, are the cases of *Reeside v. United States,* 8 Wall. 42, 19 L. Ed. 318; *Kriebel v. United States,* 10 F. 2d 762, 764, and *United States v. Felder,* 13 F. 2d 527, 528. Citing said Federal cases, Corpus Juris, in Volume 60, at page 1190, defines the word *suspend* as meaning

> "to cease temporarily from operation or activity; also to cause to cease for a time; to cause to cease for a time from operation or effect; to delay; to hinder from proceeding; to hinder the proceedings for a time; to hold in a state of indecision or indetermination; to interrupt; to intermit; to stay; to stay and delay; to stop payment or not to meet obligations or engagements; to withhold for a time on certain conditions."

An examination of the cases cited concerning prior Suspension Acts (see Appellant's Op. Br. p. 22) indicates the well established principle of law that where a Statute of Limitation is *suspended,* the period of suspension is excluded but that upon the conclusion of such period, the statute is restored to all intents as if such suspension had not occurred. It is respectfully submitted that logic supports this method of computation.

As pointed out in the *Gottfried* case, the purpose of the Suspension Act is "not to let crimes pass unpunished which have been committed during the hurly-burly of war." Section 3287 herein discussed, allows the Government a period of three years after the "hurly-burly of war has ceased" in which to bring to trial persons who committed offenses prior to the termination of hostilities.

The court is requested to take judicial notice of the fact that the chaotic condition and inefficiency of operation that are the natural consequences of war, ceased by the end of 1946. The President of the United States proclaimed the cessation of hostilities as of December 31, 1946. Thereafter the Government of the United States had a full three year period in which to prosecute offenses which were subject to such Suspension Act.

It is respectfully submitted that there is no legal basis for allowing the Government a period of six years in which to commence such prosecution. Subsequent to the 31st day of December, 1946, the reason for the Suspension Act no longer existed. War conditions no longer either impaired or curtailed the prosecution of those who violated Federal Statutes.

A reading of the Suspension Act itself contains the element that the effectiveness of its provisions terminates three years after such proclamation of the President. The offenses herein were alleged to have been committed subsequent to the proclamation of the President. No conditions impaired the prosecution of Appellant within the usual three year period. The Indictment could have been as efficiently brought in January of 1950, as it was in June of the same year.

It is respectfully submitted that after the lapse of three years, following the proclamation of the President

of the United States as to the termination of hostilities, the usual statutes of limitations were restored and resumed their effectiveness and that their provisions became applicable and that the provisions of Section 3282 thereupon provided and required that "no person shall be *prosecuted,* tried or *punished* for any offense, not capital, *unless the indictment is found . . . within three years next after such offense shall have been committed.*" (Emphasis ours.)

II.

Having Plead Nolo Contendere, the Appellant May, Upon Appeal, Contend That the Counts to Which He Made Such Plea, Do Not State a Public Offense by Reason of the Fact That They Are Barred by the Statute of Limitations.

Appellant's Contention.	Appellee's Contention.
That pleading either the occurrence within the statute of limitations or elements that extend the statute of limitations is jurisdictional to a criminal charge. (Appellant's Op. Br. p. 23.)	*None.*
That after a plea of *nolo contendere,* the Appellant may appeal upon the ground that the indictment or counts thereof to which he pleaded to not constitute a public offense. (Appellant's Op. Br. p. 27.)	*None.*

Under the within point of law, Appellant made the contentions above contained. The Appellee makes no argument contrary thereto, nor does it not challenge, distinguish or deny the authorities cited by Appellant nor cite contrary authorities.

It is therefore respectfully submitted that Appellee concedes the correctness of Appellant's said contentions of law.

III.

Appellant's Contention.	Appellee's Contention.
That Count Four (4) of the Indictment does not state a public offense in that it is not indicated therein that the application therein described was for credit or the amount thereof. (Appellant's Op. Br. p. 31.)	Count Four of the Indictment states a public offense and is otherwise sufficient. (Appellee's Op. Br. p. 17.)

The failure of Count Four (4) to allege that the credit application therein referred to, applied for or requested a credit or the amount of such credit, is conceded by Appellee. It is probable that this omission was in fact a typographical error, but such fact does not make the same sufficient as a legal pleading in a criminal procedure. True, such Count does allege that Appellant and others "for the purpose of obtaining a loan and an advance of credit" and "with the intent that such loan and advance of credit should be offered to the Federal Housing Administration for insurance . . . did prepare and present . . . a written Federal Housing Administration Title One Credit Application," all of which refers to the actions of the Appellant and others charged in said count.

The Count does not contain the necessary elements (found in all other counts) that the actual "written Federal Housing Administration Title One Credit Application" either: (1) applied for or requested credit, or (2) the specific amount, if any, of the credit applied for or requested. The only descriptive matter of such application contained in the Indictment was that "said application stating and representing that said credit was to be used for the purchase of materials for additions and improvements to a dwelling house," giving the address thereof, it being further alleged that "the defendants then knew that the loan and credit so applied for was not to be used for the purchase of materials or additions and improvements to a dwelling house at the aforesaid address . . . but was to be used for the purchase of materials for the construction of a new dwelling house." The "application" thus referred to was legally a nullity since it actually applied for nothing and as far as the facts are alleged, was blank and omitted any reference to applying for or requesting any credit or stating any amount of credit desired. In its alleged form, it could neither be "offered to or accepted by the Federal Housing Administration." It was similar to addressing a written instrument to the Federal Housing Administration and leaving the same with the designated bank, such instrument stating only the name, age and occupation of the signator thereto, all of which might be false.

The contentions of Appellant, that the omitted facts were matters of substance and that their omission constituted a fatal defect, is basically unanswered by the Appellee who solely contends that Appellant failed to make reasonable and appropriate application or information as to the omitted facts.

This conclusion is predicated upon the fact that Appellant sought in his request for a Bill of Particulars, to obtain additional information as to each of the numerous counts of the Indictment and that "there is nothing in the Bill of Particulars to indicate that Appellant distinguished Count Four (4) from the other Counts of the Indictment" (see Appellee's Br. p. 18). Had the request for a Bill of Particulars been granted, the information requested was inclusive enough that a reasonable answer thereto should have furnished the omitted particulars.

It is respectfully submitted that the omission of the aforesaid allegations from Count Four (4) caused the same to violate Federal rules of Criminal Procedure (Rule 7(c)) since the Count in its existing form is not "a plain, concise and written statement of the essential facts constituting the offense charged." It is further respectfully submitted that as a consequence thereof, Count Four (4) of the Indictment does not state a public offense.

Conclusion.

It is respectfully submitted that the plea of *nolo contendere* of Appellant to Counts Two (2) and Four (4) of the Indictment is ineffective, since said counts are both upon the facts therein stated, barred by the Statute of Limitations, and Count Four (4) fails to state essential matters of substance. It is further respectfully submitted that for such reasons the Judgment and Commitment [Tr. of Rec. p. 40] of the trial court should be reversed by this Honorable Court.

Respectfully submitted,

EUGENE L. WOLVER,

Attorney for Appellant.